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No. 00-860

IN THE

Supreme Court of the United States

CORRECTIONAL SERVICES CORPORATION,
Petitioner,

v.

JOHN E. MALESKO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Respondent's arguments in no way diminish the clear and acknowledged split in the courts of appeals. To the extent respondent's opposition addresses the merits, it only underscores the thorough development of the competing positions in the circuit courts and the need for an authoritative answer from this Court regarding the issue presented.

I. THERE IS A CLEAR AND ACKNOWLEDGED SPLIT AMONG THE COURTS OF APPEALS.

Respondent's contention that there is "substantial accord" among the circuits that *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), creates a cause of action against private entities acting under color of federal law—and that "[a]ll the circuits to face the question presented are in agreement that cases like this may proceed"—is flatly wrong. Opp. 4, 8. In fact, there is a clear, acknowledged, and irreconcilable split in the circuits concerning the question presented. Compare *Kauffman* v. *Anglo-American Sch. of Sofia*, 28 F.3d 1223, 1224, 1226-28 (D.C. Cir. 1994), with Pet. App. 5a-12a, and *Hammons* v. *Norfolk S. Corp.*, 156 F.3d 701, 704-08 (6th Cir. 1998); see also *Heinrich ex rel. Heinrich* v. *Sweet*, 62 F. Supp. 2d 282, 307-08 (D. Mass. 1999) (following *Hammons*).

1. There is a clear and acknowledged split of authority about the impact of *FDIC* v. *Meyer*, 510 U.S. 471 (1994), on extending a *Bivens* cause of action to private entities acting under color of federal law. Indeed, the Second Circuit below, in the most recent circuit opinion to address the issue, expressly acknowledged the split, stating that since *Meyer* "other circuits have . . . reached differing conclusions regarding [*Meyer*'s] impact." Pet. App. 7a. In particular, as the Second Circuit correctly recognized, the D.C. Circuit in *Kauffman* "held that *Meyer*'s reasoning preclude[s] *Bivens*

claims against private entities acting under color of federal law." *Id.* at 8a. "In contrast, the Sixth Circuit in *Hammons* . . . concluded that '[n]othing in *Meyer* prohibits a *Bivens* claim against a private corporation that engages in federal action,' and held that such claims should be allowed." *Id.* (quoting *Hammons*, 156 F.3d at 705). The Second Circuit found "the Sixth Circuit's analysis in *Hammons* persuasive and, substantially for the reasons articulated by that court, we hold that a private corporation acting under color of federal law may be sued under *Bivens*." *Id.* at 10a.

Likewise, before the Second Circuit's decision, the Sixth Circuit in *Hammons* acknowledged that it was creating a decisional conflict. The Sixth Circuit recognized that "*Kauffman* held that a *Bivens* action cannot be brought against private entities engaging in federal action." 156 F.3d at 703. The Sixth Circuit, by contrast, itself "h[e]ld that a *Bivens* claim can be brought against a private corporation that engages in federal action." *Id.* at 708. The split could hardly be more concrete or more clearly acknowledged by the circuits.

2. In *Kauffman*, the first post-*Meyer* circuit case to address the issue, the D.C. Circuit held that *Meyer* "is controll[ing]" and barred a *Bivens* action against "'a private and independent organisation,'" the Anglo-American School of Sofia. *Kauffman*, 28 F.3d at 1224. Nevertheless, respondent asserts that *Kauffman* does not really hold what the D.C. Circuit said it does: "However broadly the D.C. Circuit may have painted its holding, the facts of the cases are so different that the decisions [of the D.C., Second, and Sixth Circuits] cannot plausibly be said to conflict." Opp. 8.

Respondent attempts to cabin *Kauffman* as "factually unique, and easily distinguishable" because, he asserts, the entity there was "quasi-governmental" and essentially a government agency, like the entity at issue in *Meyer*. Opp. 7; see also Pet. 9 n.3 (describing entity in *Kauffman*).

Respondent's attempts to skirt the *Kauffman* decision are unavailing. First, the *Kauffman* court expressly stated that the entity in the case "*is not a federal agency*: it is plainly a different sort of entity than the . . . agency at issue in *Meyer*." *Kauffman*, 28 F.3d at 1226 (emphasis added). Moreover, even if one does not take the D.C. Circuit at its word, as noted in the petition for certiorari (Pet. 9 n.3)—yet ignored in respondent's opposition—in case there is any doubt about the legal standard that controls in that Circuit, the D.C. Circuit has further applied *Kauffman* to dismiss a *Bivens* claim against a private entity, the American Correctional Association ("ACA"), that has even fewer ties to government than did the entity in *Kauffman*. See *Bailey* v. *Illinois Freedom Militia S. Zone*, No. 98-5094, 1998 WL 545425, at *1 (D.C. Cir. July 17, 1998) (citing *Kauffman* and stating that "because ACA is not a federal actor . . . appellant's *Bivens* action cannot stand"). Indeed, in *Bailey*, the D.C. Circuit found the application of *Kauffman* to this private entity "so clear as to warrant summary action." *Id.* Accordingly, there can be no question about the rule of law in the D.C. Circuit.

Respondent may disagree with the merits of *Kauffman*'s analysis, but the D.C. Circuit's holding is clear, has been subsequently applied to an entity with even fewer ties to government, and results in a clear and acknowledged split with the Second and Sixth Circuits.

3. Furthermore, in light of *Meyer* and the above-described circuit split that arose in its wake, certain pre-*Meyer* circuit decisions that seemed to assume the availability of a *Bivens* cause of action hardly present "a long chain of precedent holding that a cause of action exists against private defendants acting under color of federal law." Opp. 5-6 (listing cases); see also Pet. 13-14 & n.5.

Even before *Meyer*, the links of this supposed "long chain of precedent" were suspect. As the D.C. Circuit explained, these cases "simply assumed without analysis that private *entities*

were no less susceptible to *Bivens* actions than private *individuals*." *Kauffman*, 28 F.3d at 1226. Moreover, "[e]ven before *Meyer*, other courts had rejected this assumption." *Id.* (citing *Shannon* v. *General Elec. Co.*, 812 F. Supp. 308, 323 (N.D.N.Y. 1993)).

But the Court need not linger on the merits of this point. More important for present purposes is the fact that the post-*Meyer* circuit split clearly continues with respect to the impact of *Meyer* on the vitality of these earlier cases. On the one hand, the Second Circuit was "not persuaded that the Supreme Court implicitly overruled this long line of cases in the *Meyer* opinion without making reference to any of them." Pet. App. 12a. Nor was the Sixth Circuit. *Hammons*, 156 F.3d at 708 (citing and "join[ing]" the pre-*Meyer* cases); see also *Heinrich*, 62 F. Supp. 2d at 308 (following *Hammons* and pre-*Meyer* circuit precedent "that appears to allow the use of *Bivens* against private entities"). By contrast, the D.C. Circuit held that the pre-*Meyer* cases assuming *Bivens* causes of action against private corporations "do[] not survive *Meyer*." *Kauffman*, 28 F.3d at 1226, 1228 & n.3.

For all of these reasons, there is an acknowledged and irreconcilable conflict among the circuits about whether a *Bivens* cause of action can be extended to private entities acting under color of federal law. Moreover, as is further evident from the remainder of this brief, the circuits already have had the opportunity to develop fully the competing arguments as to why such a cause of action is—or is not—appropriate. Accordingly, no further development among the circuits is necessary. Rather, there is a need for an authoritative resolution of this important question by this Court.

II. RESPONDENT'S REMAINING ARGUMENTS ADDRESS THE MERITS AND ONLY UNDERSCORE THAT THE COMPETING ANALYSES HAVE BEEN FULLY DEVELOPED BY THE CIRCUITS.

Respondent's remaining exposition of the merits of the circuit courts' competing analyses about whether to extend *Bivens* only emphasizes the depth and ripeness of the circuit split, the thoroughness of the development of the opposing legal analyses in those circuits, and the need for an answer from this Court.

1. Respondent's assertion that extending *Bivens* liability to private entities acting under color of federal law would not "take money from the public fisc, the integrity of which was an important consideration in *Kauffman*, *Meyer* and the decision below," Opp. 7-8, does not withstand scrutiny and only emphasizes the split of authority in the circuits. See also Pet. 12-13.

In *Meyer*, this Court unanimously rejected an invitation to extend a *Bivens* cause of action to federal agencies because one of the "'special factors counselling hesitation'" in extending *Bivens*'s reach was "creating a potentially enormous financial burden for the Federal Government." *Meyer*, 510 U.S. at 486 (quoting *Bivens*, 403 U.S. at 396). The Court left "it to Congress to weigh the implications of such a significant expansion of Government liability." *Id.* This reasoning applies with equal force to government contractors such as petitioner. As the Court recognized in *Boyle* v. *United Technologies Corp.*, 487 U.S. 500 (1988): "It makes little sense to insulate the Government against financial liability . . . when the Government [provides the service] itself, but not when it contracts for the [service]." *Id.* at 512.

Indeed, the Court has recognized that government contractor liability places a direct strain on federal fiscal policy: "The imposition of liability on Government contractors will directly

affect the terms of Government contracts: either the contractor will decline to [do business with the federal government] or it will raise its price. Either way, the interests of the United States will be directly affected." *Id.* at 506. The Court further recognized that "[t]he financial burden of judgments against [government] contractors would ultimately be passed through, substantially if not totally, to the United States itself, since [government] contractors will predictably raise their prices to cover, or to insure against, contingent liability." *Id.* at 511-12.

Regardless of the merits of this point, however, there is a clear split among the circuits about whether extending *Bivens* liability to private entities would, in respondent's words, "create a financial threat to the federal government." Opp. 10. On the one hand, the D.C. Circuit explained that a "diversion of resources from a private entity created to advance federal interests has effects similar to those of [a] diversion of resources directly from the Treasury." *Kauffman*, 28 F.3d at 1227-28. Furthermore, if the private entity diverted funds for liability payments, "the government presumably w[ould] have to choose between allowing its interest to be served less well and spending more money to make up the shortfall—precisely the same choice that it would confront if *Bivens* actions could be brought against federal agencies." *Id.* at 1227.

By contrast, the Sixth Circuit rejected this analysis in that context because "[a]llowing a *Bivens* claim against a private corporation does not implicate 'federal fiscal policy,' where, as here, the federal purse is not involved." *Hammons*, 156 F.3d at 706. Similarly, the Second Circuit, while conceding that government contractors "might pass on the costs of *Bivens* liability to the government," nonetheless concluded that "we do not believe such liability has the type of direct impact on federal fiscal policy that the Supreme Court in *Meyer* was concerned would result from imposing *Bivens* liability directly upon federal agencies." Pet. App. 11a. In short, the circuits have fully developed the competing analyses

and an authoritative answer regarding the issue presented is needed.[1]

2. Respondent's argument that the government should not be permitted "to hire corporations to do what the government itself may not," Opp. 12, is inapposite because the fundamental teaching of *Meyer* is that a government agency is *not* subject to a *Bivens* suit. Accordingly, respondent is no worse off than if he wanted to sue a government agency, rather than a private entity acting under color of federal law.[2] That is, respondent has a cause of action against the individual wrongdoer under *Bivens*, but not against the entity.

In fact, it is respondent who seeks to have it both ways, asserting that: "[a] private entity that steps into the shoes of government" should be subject to a *Bivens* suit so as "not [to] erode constitutional protections against those acting under color of state law," but this entity should not be treated like a government agency under *Bivens*. Opp. 12. The Second and Sixth Circuits may agree. But the D.C. Circuit usefully reminds that *Bivens* plaintiffs "enjoy a constitutional claim

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[1] Respondent engages in rank speculation in asserting that "CSC carries (per the Government's requirement) liability insurance" to cover its own potential *Bivens* liability. Opp. 11. But even assuming, *arguendo*, that this is correct, as shown above, *Boyle* recognizes that increased insurance costs imposed on government contractors directly impact the federal fisc. 487 U.S. at 506, 511-12.

[2] Moreover, as shown in the petition (Pet. 16), it is the Second and Sixth Circuits' approach that creates the anomalous result that prisoners in private federal facilities have an *additional* cause of action not available to those in public federal facilities. *Compare, e.g.*, Pet. App. 12a (permitting *Bivens* action against Petitioner CSC, a private corporation operating a correctional facility on behalf of BOP, despite *Meyer*), *with Tejeda* v. *Reno*, No. 00-CIV-6338 SAS, 2000 WL 1280969, at *3 (S.D.N.Y. Sept. 11, 2000) (following *Meyer* and prohibiting *Bivens* action against BOP and a federal penitentiary), *and Newman* v. *Holder*, 101 F. Supp. 2d 103, 107 (E.D.N.Y. 2000) (holding BOP "as an agency of the United States, is not a proper defendant in a *Bivens*-type action").

only to the extent that the [private actor's decision] can be analogized to the decision of a federal agency." *Kauffman*, 28 F.3d at 1226. Accordingly, "[w]e think it untenable to draw this analogy for purposes of *Bivens* but not for purposes of Meyer." *Id.*

3. Respondent suggests that certain "bolster[ing]" jurisprudence arising in the context of 42 U.S.C. § 1983 should be imported wholesale into the *Bivens* context. Opp. 11. There is a core distinction, however, between a cause of action created by Congress that contains express statutory parameters (Section 1983) and a judge-made cause of action created in the absence of any express remedy from Congress (*Bivens*). As evidenced in *Meyer*, the Court has been chary to expand *Bivens*—a judicially crafted action untethered to any statutory language and devoid of any guidance from Congress—to new contexts, let alone to entirely new categories of defendants. 510 U.S. at 484-86.

4. None of this impacts whether a plaintiff can bring a *Bivens* action against a proper *Bivens* defendant. Indeed, respondent assumes that ordinarily the wrongdoing individual acting under color of federal law is amenable to a *Bivens* suit. See Opp. 9.[3] While that issue is not before the Court, it is only because of respondent's failure timely to amend his complaint to name the wrongdoing individuals that he is left without this possible *Bivens* remedy. See *id.* at 3; Pet. App. 18a, 21a-24a.[4]

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[3] Moreover, respondent correctly acknowledges that additional remedies may be available under state tort law. Opp. 13.

[4] Respondent starkly asserts that petitioner "acknowledged that it would indemnify" its employees for their constitutional torts and that it is "unimaginable" that petitioner has not agreed to do so. Opp. 11. Respondent cites nothing in the record to support this bald claim, nor can he.

Declining to extend *Bivens* to private entities acting under color of federal law would not, as respondent contends, "strip . . . citizens of constitutional protections by placing them in the physical custody of private corporations" without proper remedies. Opp. 14. To the contrary, it would place citizens in precisely the same position they would be in if a government agency itself were providing the services in question. See Pet. 14-16 (explaining the anomalous results of the current split of authority); *supra*, n.2. In both cases, the *entity* would not be amenable to a *Bivens* suit. This interpretation satisfies the Court's unanimous recognition that "the purpose of *Bivens* is to deter *the officer*," while not improperly extending *Bivens* beyond its "logic[al]" limits. *Meyer*, 510 U.S. at 485, 486.

As aptly described by the D.C. Circuit, plaintiffs "enjoy a constitutional claim only to the extent that the [private actor's decision] can be analogized to the decision of a federal agency," that is, to the extent they are acting under color of federal law. *Kauffman*, 28 F.3d at 1226. "We think it untenable to draw this analogy for purposes of *Bivens* but not for purposes of *Meyer*." *Id.* The Second and Sixth Circuits, however, have squarely disagreed. The question presented has been thoroughly aired in the circuits and is primed for an authoritative answer from the Court. The Court should grant the petition to resolve this irreconcilable conflict in the circuits, at which point the merits of the conflicting positions can be fully briefed.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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